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In The
Supreme Court of the United States

OCTOBER TERM, 1974

No. 75-380

SEABOARD COAST LINE RAILROAD COMPANY, a corporation,

Petitioner,

-vs-

JONATHAN W. DIXON,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL FIRST DISTRICT, STATE OF FLORIDA

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JONATHAN W. DIXON,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL FIRST DISTRICT, STATE OF FLORIDA

Petitioner[1] prays that a writ of certiorari issue to review the judgment of the District Court of Appeal, First District, State of Florida, entered in the above-entitled case.

OPINIONS BELOW

The opinion and judgment of the District Court of Appeal, First District, State of Florida, dated November 12, 1974, and here sought to be reviewed, is printed in Appendix G hereto

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[1]Petitioner was defendant in the trial court and appellant in the District Court of Appeal, First District, below.

and is reported at 303 So.2d 39. The order of the Circuit Court of the Fourth Judicial Circuit, in and for Duval County, Florida, dated September 5, 1974, which was affirmed by the judgment here sought to be reviewed, is printed in Appendix D hereto and is not reported. The order of the Supreme Court of Florida, dated June 18, 1975, denying a petition for a writ of certiorari to review the judgment of the District Court of Appeal, First District, State of Florida, is printed in Appendix H hereto and is reported at 315 So.2d 181.

JURISDICTION

The judgment of the District Court of Appeal, First District, State of Florida, was dated November 12, 1974. Thereafter, in an effort to exhaust all possible state court remedies, petitioner timely filed a petition for a writ of certiorari to the Supreme Court of Florida[2] seeking review of the judgment

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[2]Article V, Section 4(2), of the Florida Constitution provides in part as follows:

> "The Supreme Court may review by certiorari any decision of a District Court of Appeal that affects a class of constitutional or state officers, or that passes upon a question certified by the District Court of Appeal, to be of great public interest, or that is in *direct conflict* with a decision of another District Court of Appeal or of the Supreme Court on the same point of law, and may issue writs of certiorari to commissions established by law." [Emphasis supplied.]

By petition for writ of certiorari, it was pointed out to the Florida Supreme Court that the ruling here is reviewable on "conflict" certiorari. It is squarely contrary to the decision of the Florida Third District Court of Appeal in *Southern Railway Co. v. McCubbins*, 196 So.2d 512 (Fla., 3d D.C.A., 1967). In the *Southern Railway Co.* case, a Virginia corporation doing business in Florida was allowed to apply to the

of the District Court of Appeal. The Supreme Court of Florida denied the petition for a writ of certiorari on June 18, 1975 (315 So.2d 181, Appendix H hereto).

Under these circumstances, the writ of certiorari runs to the District Court of Appeal, First District, State of Florida. See *Missouri K&T R Co. v. Elliot*, 184 U.S. 530 (1902); *Sullivan v. Texas*, 207 U.S. 416 (1908); *Cuyahogarp Co. v. Northern Realty Co.*, 240 U.S. 300 (1917); *Randall v. Board of Commissioners*, 261 U.S. 252 (1923); *American Railway Express Co. v. Levee*, 263 U.S. 19 (1923); *Adam v. Saenger*, 303 U.S. 59 (1938); *Callender v. United States*, 380 U.S. 519, 383 U.S. 270 (1965); *Beckley v. Hanks*, 389 U.S. 81 (1967); and *Stern and Gressman*, Supreme Court Practice, p. 113, 4th Edition; p. 88, 3rd Edition; and p. 79 2nd Edition.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1257 (3). The judgment of the Florida District Court of Appeal violates the rights of the petitioner guaranteed by the Fourteenth Amendment to the Constitution of the United States.

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trial court's discretion under the doctrine of forum non conveniens for a determination as to whether or not because of convenience factors the action could be maintained in Florida, and based upon that doctrine the action was dismissed. In the present case, the Seaboard Coast Line Railroad Company, petitioner herein, was not allowed to apply to the trial court's discretion under the doctrine of forum non conveniens, even though it also was a Virginia corporation doing business in Florida.

Accordingly, petitioner here has exhausted its remedies for review in the courts of Florida and its only recourse now is in the Supreme Court of the United States.

QUESTION PRESENTED

Is it a denial of the equal protection of the laws for Florida to allow its trial courts to apply their discretion under the doctrine of forum non conveniens (i.e., making a determination as to whether or not because of convenience factors the action should be maintained in Florida) on behalf of the Southern Railway Company, a Virginia corporation doing business in Florida, and divest its trial courts of discretion to apply that doctrine in cases involving the Seaboard Coast Line Railroad Company, also a Virginia corporation doing business in Florida?

CONSTITUTIONAL PROVISION INVOLVED

Constitution of the United States

Amendment XIV:

". . . [N]or [shall any state] deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Jonathon W. Dixon, the respondent, brought this suit in the Circuit Court of Duval County, Florida under the Federal Employers' Liability Act (FELA), 45 U.S.C. §§51 et seq. The complaint claimed damages for personal injuries allegedly sustained while in the course and within the scope of respondent's employment with the Seaboard Coast Line Railroad Company (referred to sometimes hereinafter as "SCL"), the petitioner herein. It was filed by the respondent's attorneys (who maintain their offices in Miami, Florida) and complains of an accident which allegedly occurred in Homerville, Georgia on or about February 6, 1973 (Appendix A).

The summons and service copy of the complaint were served on Roderick M. Nicol, as the resident agent designated by the nonresident or foreign defendant corporation to accept service of process in Florida (Appendix B).

The petitioner, defendant below, served upon plaintiff's attorneys its motion to dismiss under the doctrine of forum non conveniens, together with a supporting factual affidavit executed by Mr. Nicol (the aforesaid resident agent for the defendant and also General Solicitor for the defendant corporation). No other evidence was before the court.

The factual situation, as it related to the applicability of the doctrine of forum non conveniens, and as reflected by the record (Appendix C), is as follows:

1. The plaintiff (respondent herein) was, at the time of the alleged accident giving rise to this litigation, and at all times subsequent thereto, a citizen and resident of the State of Georgia.

2. At the time of said accident and at all times subsequent thereto, the defendant SCL (petitioner herein) was, and still is, a corporation organized and existing under the laws of the State of Virginia, with its corporate headquarters and principal corporate offices headquartered and located in Richmond, Virginia. The Chairman of the Board of Directors and Chief Executive Officer of the defendant, the Secretary of the corporation and the Treasurer of the corporation all have permanent offices in the aforesaid principal corporate headquarters and office building in Richmond, Virginia, and all of such principal corporate officers permanently reside in Richmond, Virginia. In addition, the President of the corporation maintains a permanent office at said corporate headquarters in Richmond, Virginia. The Law Department of the

railroad maintains extensive permanent offices in said principal corporate headquarters and an office building in Richmond, Virginia, with personnel of said Law Department permanently residing in Richmond, Virginia, including the General Counsel for the company.

3. The alleged accident which is the subject matter of plaintiff's action occurred at Homerville, Georgia.

4. The alleged accident, if not wholly caused by the negligence of the plaintiff, was caused by the negligence of C. M. Eunice, Jr., trading as Homerville Pole Company in Homerville, Georgia, and since any cause of action by SCL for indemnity against said C. M. Eunice, Jr. did not arise out of any activities of the potential third party defendant in the State of Florida, the defendant will be unable to have the third party action disposed of in the present litigation.

5. All the known witnesses who may be called by plaintiff or defendant, with the exception of two medical doctors recently employed by plaintiff in Miami, Florida, and one medical doctor who saw plaintiff in Jacksonville, Florida, reside in the State of Georgia, as follows:

(a) The other members of the train crew involved in the subject litigation and who have knowledge of the allegations contained in the complaint, all three of whom live in Waycross, Georgia.

(b) The defendant's employees who inspected the premises following the alleged accident, all of whom live in Waycross, Georgia.

(c) The defendant's employees who investigated the alleged accident and who took statements from the various witnesses in preparation of the company's defense of this suit, as well as the Chief Dispatcher and the Superintendent, reside in Waycross, Georgia.

(d) The potential third party defendant and his two employees who have relevant knowledge concerning the alleged accident reside in Homerville, Georgia.

(e) The physicians, five in number, and the physical therapist who have examined and treated plaintiff for his alleged injuries, all reside in Waycross, Georgia, in addition to two medical doctors recently employed by plaintiff from Miami, Florida and a medical doctor who treated plaintiff as a consultant in Jacksonville, Florida.

6. None of the indicated witnesses who reside in Georgia are subject to the subpoena process in the State of Florida, and defendant cannot by any means compel the non-employee witnesses to attend the trial of this case in Jacksonville, Florida, and defendant thereby would be deprived of its legal right to have such witnesses confronted by the jury and the court to determine their veracity and credibility. Furthermore, the potential third party defendant is not subject to service in the State of Florida, and to continue the present suit will result in a multiplicity of litigation and undue and unreasonable expense to the defendant.

7. The trial of this case in the State of Florida will also involve great and unreasonable expense and inconvenience to the defendant in that all the witnesses listed above employed by the defendant, being some eleven in number, must be transported to Jacksonville, Florida, and kept there for the duration of the trial, all at great expense for transportation, housing, and loss of time of these employees, and further, that if the non-employee witnesses are willing to attend the trial, their expenses also would be a great and unwarranted burden upon the defendant.

8. The State of Georgia provides an adequate forum for plaintiff to litigate this cause of action, where the witnesses

reside and where the plaintiff resided and presently resides, and where the potential third party defendant resides and conducts his business. Furthermore, the dockets of the courts of general jurisdiction in Georgia, both state and federal, are not congested, and any suit which plaintiff might institute in that jurisdiction could be expeditiously tried and heard by an impartial court or jury.

9. The litigation of this cause in Jacksonville, Florida constitutes an undue and unnecessary imposition upon a busy Florida court (Circuit Court of Duval County, Florida), adding unnecessarily to its docket a cause of action that arose in another state between nonresident litigants.

Pursuant to notice of hearing served by the defendant, and after argument before the court, the trial court on September 5, 1974 denied defendant's motion to dismiss under the doctrine of forum non conveniens (Appendix D). In the order, the trial court made the following recital:

> "Although there are several sound reasons for the application of the doctrine, the decisions in *Adams v. Seaboard Coast Line Railroad Company*,[3] (Fla.App. 1) 224 So.2d) 797, and *Shaw v. Seaboard Coast Line Railroad Company*, (Fla.App. 1) 229 So.(2d) 275, interdict a judge of this Court from exercising any discretion in the matter."

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[3]In the *Adams* case, the Florida First District Court of Appeal held "that the application of the doctrine of forum non conveniens is restricted to the limited category of cases in which both parties to the action are nonresidents, and the cause of action sued upon arose in a jurisdiction outside of Florida," and concludes that for all practical purposes SCL is a Florida resident and is not entitled to claim the benefits of the doctrine.

From this order, the defendant perfected an interlocutory appeal, duly filing and serving its notice of interlocutory appeal (Appendix E).

The District Court of Appeal, First District, in a per curiam decision, dismissed the appeal, stating:

> "Interlocutory appeal dismissed. See Adams v. Seaboard Coast Line Railroad Co., 224 So.2d 797 (Fla. App. 1st, 1969); Shaw v. Seaboard Coast Line Railroad Co., 229 So.2d 275 (Fla.App. 1st, 1970), cert. den. 237 So.2d 540 (Fla., 1970); Seaboard Coast Line Railroad Co. v. Ford and Britt, 238 So.2d 473 (Fla. App. 1st, 1970); and Seaboard Coast Line Railroad Co. v. West, 242 So.2d 156 (Fla.App. 1st, 1971), cert. den. 246 So.2d 112 (Fla., 1971). We have considered Fowler v. Chillingworth, 94 Fla. 1, 113 So.667 (Fla. 1927) cited by appellant in its reply to appellee's motion." (Appendix G).

In an effort to exhaust all possible state court remedies, petitioner filed a timely petition for a writ of certiorari with the Supreme Court of Florida seeking review of such judgment. The petition for certiorari was denied on June 18, 1975 (Appendix H).

REASONS FOR GRANTING WRIT

Plaintiff Dixon is a nonresident of the State of Florida. The alleged accident which is the subject matter of plaintiff's action occurred outside the State of Florida. Defendant SCL is a Virginia corporation which is doing business in the State of Florida and in Duval County. Under that state of facts, the FELA, 46 U.S.C.A. §56, provides that an aggrieved railroad employee "may" bring his action in the state courts

of any state where the defendant railroad is doing business. The Circuit Court of Duval County, Florida, has jurisdiction to adjudicate this cause. Defendant SCL contends, however, that in this particular case and based upon the record before the lower courts and before this Court, the plaintiff in selecting the Circuit Court of Duval County, Florida as the forum for his litigation has unnecessarily selected an unreasonably inconvenient forum for both parties and for all witnesses, and defendant is entitled to apply to the discretion of the trial court to have the action dismissed under the doctrine of forum non conveniens.

Applicability of the Doctrine of Forum Non Conveniens in an FELA Case

Since this Court's decision in *Missouri ex rel. Southern R. Co. v. Mayfield*, 340 U.S. 1, (1950), it has been recognized that a state court may apply the doctrine of forum non conveniens in an action brought under the FELA so long as it does not discriminate in the application of the doctrine.

Florida Recognizes the Doctrine

The local law of Florida provides for the use of the doctrine of forum non conveniens, with the restriction that both parties to the action must be nonresidents. In *Southern Railway Company v. McCubbins*, 196 So.2d 512 (Fla., 3d D.C.A., 1967), one of the Florida appellate courts applied the doc-

trine of forum non conveniens in an FELA case, stating at page 514 as follows:

> "Subsequent to the passage of [28 U.S.C. §1404(a)] the United States Supreme Court has held that the doctrine can be applied by state courts in FELA cases. Missouri ex rel. Southern Pacific Railway Co., 340 U.S. 1, 71 S.Ct. 1, 95 L.Ed. 3. The doctrine of forum non conveniens is one which is sanctioned by the law of this state, where the cause of action arose in another jurisdiction and neither party resides in Florida. Hagen v. Viney, 124 Fla. 747, 169 So.391."

Many of the circuit judges of Florida have applied the doctrine of forum non conveniens in railroad cases, even (in the past) for the petitioner.

In dismissing the action in *Hubbard v. Southern Ry. Co.*, 14 Fla. Supp. 10 (1959), the trial judge recognized the inherent power of a Florida court to decline jurisdiction even though jurisdiction existed, but where there was another forum which also had jurisdiction over the parties and the subject matter, and where the case could more appropriately and justly be tried elsewhere. Judge Anderson stated at page 12 as follows:

> "The court is constrained to note, however, the anomaly that would result if this court could not enter this order--a state court would have to consider every case brought under the FELA even though a U.S. district court sitting in the same state could transfer the case to another district on the basis of preventing inconvenience and promoting justice [28 U.S.C.A. §1404(a)]."

See Appendix I and discussion at pages 23 and 24, infra, to see the fulfillment of that prophecy.

In *Baker v. Atlantic Coast Line Railroad Co.*, 21 Fla. Supp. 21 (1963), the court dismissed that case with the observation

that plaintiff does not have an "unrestricted" right to maintain these transitory FELA actions in Florida, and that the controlling law in Florida on the application of the doctrine of forum non conveniens "leaves no doubt that the application of the doctrine rests in the sound discretion of the trial judge."

To the same effect, see *Autry v. Seaboard Coast Line Railroad Co.*, 32 Fla. Supp. 53 (1968), where the court held at page 54 as follows:

> "But it makes no sense at all to try this action in Jacksonville, and import everybody and everything from South Carolina and North Carolina in order to do so.
>
> "If the doctrine of forum non conveniens is ever to come into play in litigation in a state court in Florida, this is the sort of situation in which it should do so, for this is a classic case in which there is no balancing of factors of convenience to be done--there being no factors at all making it convenient for anyone to have the trial in Jacksonville. And it seems now to be established that the doctrine is to take its place in Florida law. See Southern Railway Company v. McCubbins, 196 So.2d 512 (D.C.A. 3, Fla., 1967), decided by the same Third District Court of Appeal that had earlier decided Touchton v. Atlantic Coast Line Railroad Company, 155 So.2d 738, 739 (D.C.A. 3, Fla., 1963), quoted approvingly by the First District Court of Appeal in Texas Gulf Sulphur Company v. Downtown Investment Company, supra. See, also, Southern Railway Company v. Bowling, 129 So.2d 433 (D.C.A. 3, Fla., 1961). [Hubbard v. Southern Railway Co., 14 Fla.Supp. 10; Baker v. Atlantic Coast Line R.R. Co., 21 Fla.Supp. 21.]

> "The only way this court could retain this action on its docket is to hold flatly that the doctrine of forum non conveniens is not invokable in a Florida state court under any circumstances. *The law,* as laid down by the First and Third District Courts of Appeal, *is otherwise.*" [Emphasis supplied.]

The restriction that both parties to the action must be nonresidents in order for the doctrine of forum non conveniens to be applied had its genesis in *Hagen v. Viney,* 124 Fla. 747, 169 So. 391 (Fla., 1936), where the Supreme Court of Florida stated at pages 392 and 393 as follows:

> "It is settled law that courts of one state are not required to assume jurisdiction of causes between nonresidents arising in other jurisdictions, though by the rule of comity rather than that of strict right they generally do so. After all is said, the question of jurisdiction in transitory actions between nonresidents is one of discretion on the part of the court assuming it, and no rule has yet been promulgated to guide that discretion."

The issue involved in *Hagen* was whether the courts of Florida had jurisdiction over the nonresident parties and over the transitory cause of action which had arisen in another state. But the application of the doctrine of forum non conveniens presupposes the presence of jurisdiction. If the court lacked jurisdiction, the doctrine would never come into play, since dismissal would be proper in any event, without resorting to the doctrine.

Contrary to the position the Florida courts have taken, the great weight of authority would indicate that the residence of the parties is a factor for consideration in applying the

doctrine of forum non conveniens, but it is not the *sole* determining factor. The Supreme Court of Kansas in the case of *Gonzales v. Atchison T.&S.F. R. Co.*, 371 P.2d 193 (Kan., 1962), said that the fact that Kansas was the defendant railroad's corporate domicile in an FELA suit by no means precluded application of the doctrine where the accident occurred outside the state.

In a well reasoned opinion in the case of *Gore v. United States Steel Corp.*, 104 A.2d 670 (N.J., 1954), the Supreme Court of New Jersey said at pages 675 and 676 as follows:

> "However, the doctrine, as we construe it, is non-discriminatory and does not turn on considerations of domestic residence or citizenship as against foreign residence or citizenship. It turns, rather, on considerations of convenience and justice and it may, therefore, be applied for and against domestic residence and citizens as well as for and against foreign residents and citizens. It is true that under the doctrine an action by or against a resident will ordinarily not be dismissed as being in an inconvenient forum, but it is also true that ordinarily an action by or against a nonresident will not be dismissed as such. It is only in those exceptional cases where a weighing of all of the many relevant factors, of which residence is but a part, decisively establishes that there is available another forum where trial will best serve the convenience of the parties and the ends of justice, that the doctrine is ever invoked."

In the cases of *Koster v. American Lumbermen Mutual Cas. Co.*, 330 U.S. 518, (1947), and *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, (1947), this Court had occasion to apply the doctrine of forum non conveniens and express the major con-

siderations underlying its exercise. In neither case was it said that the doctrine could not be applied to a resident of the state in which the doctrine is attempted to be invoked.

The Florida requirement that the parties to the action be nonresidents in order for the doctrine of forum non conveniens to be invoked discriminates against residents of the State, and it becomes an issue in this case through the convoluted reasoning of the District Court of Appeal, First District, when it says that the Seaboard Coast Line Railroad Company, even though not a domestic corporation, is "for all practical purposes" a resident of Florida and therefore cannot avail itself of the doctrine.

Denial of Equal Protection of the Laws to Seaboard Coast Line Railroad Company

1. SCL as a Nonresident

The issue squarely presented to this Court is whether or not the Florida courts are discriminating against the Seaboard Coast Line Railroad Company in the application of the doctrine of forum non conveniens.

In *Southern Railway Co. v. McCubbins*, supra, the Southern Railway Company, a Virginia corporation doing business in Florida, was allowed to raise and utilize the doctrine of forum non conveniens. In that case the Third District Court of Appeal stated at pages 514 and 515 as follows:

> "Neither of the parties is a resident of the State of Florida. The plaintiff resides in Knoxville, Tennessee, where he has been a registered voter since 1945. The defendant railway company is a Virginia corporation. Its principal office is not in Florida. It has an office

and agent in Dade County, Florida, but does not operate its trains south of Jacksonville."

In *Adams v. Seaboard Coast Line Railroad Co.*,[4] 224 So.2d 797 (Fla., 1st D.C.A., 1969), and its progeny, including the present case, the Seaboard Coast Line Railroad Company, also a Virginia corporation doing business in Florida, is precluded from seeking the benefits of the doctrine of forum non conveniens and making application to the sound discretion of the trial court to determine whether the court should retain jurisdiction of the action or dismiss it without prejudice to the right of the respondent to reinstitute the action in a more appropriate and convenient forum.[5]

The District Court of Appeal, First District, in *Adams v. Seaboard Coast Line Railroad Co.*, supra, recognized the doctrine of forum non conveniens as previously enunciated when it stated at 224 So.2d page 800 as follows:

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[4]The District Court of Appeal, First District, in its order dismissing the interlocutory appeal, relies on the case of *Adams v. Seaboard Coast Line Railroad Company*, 224 So.2d 797 (Fla., 1st D.C.A., 1969). The other cases cited by the District Court of Appeal in its opinion were subsequently decided on the same basis as the *Adams* decision.

[5]The trial court never made a determination on "convenience factors" whether the motion to dismiss under the doctrine of forum non conveniens should be granted, although it stated that "there are several sound reasons for the application of the doctrine" in this case. The only holding was that it was divested of any discretionary powers to apply the doctrine because of the decisions in *Adams v. Seaboard Coast Line Railroad Co.*, 224 So.2d 797 (Fla., 1st D.C.A., 1969), and *Shaw v. Seaboard Coast Line Railroad Company*, 229 So.2d 275 (Fla., 1st D.C.A., 1970).

"From the foregoing decisions the principle emerges as the recognized law of this state that if a transitory action is filed in a court of Florida between *nonresident parties* seeking to litigate a cause of action accruing in a foreign jurisdiction, the trial court is accorded a sound discretion in determining whether it should retain jurisdiction of the action or dismiss it without prejudice to the right of the plaintiff to reinstitute the action in a more appropriate and convenient forum . . . In the ultimate, however, it is seen that the application of the doctrine of forum non conveniens is restricted to the limited category of cases in which both parties to the action are *non-residents*, and the cause of action sued upon arose in a jurisdiction outside of Florida." [Emphasis supplied.]

The District Court held, however, that under the facts as presented in the *Adams* case, supra, SCL, even though a Virginia corporation, is nonetheless a resident of Florida *for all practical purposes*. The court said at page 801 as follows:

> "For all intents and practical purposes insofar as proper venue of this action is concerned, defendant occupies the same position as does a Florida citizen or a Florida corporation. It would appear to us that the mere fact that it received its corporate charter from some other state would not alter its position as an operating entity having its official headquarters and principal place of business in Florida."

The holding of the District Court of Appeal in the instant case, based upon the precedent in the *Adams* case, supra, in which it finds that SCL is a resident of Florida, is a conclusion that is contrary to and is in direct conflict on the same point of law with the decision by the Supreme Court

of Florida in *Fowler v. Chillingworth*, 94 Fla. 1, 113 So. 667 (Fla., 1927).[6]

Fowler v. Chillingworth, supra, is the landmark case in Florida dealing with the question of the *residence of a corporation*. In that case the Supreme Court of Florida stated at page 669 as follows:

> "In the first place a domestic corporation is an artificial person whose residence or domicile is fixed by law within the territorial jurisdiction of the state which created it. That residence cannot be changed temporarily or permanently by the migrations of its officers or agents to other jurisdictions. So long as it is an existing corporation, its residence, citizenship, domicile, or place of abode is within the state which created it. *It cannot reside* or have its domicile *elsewhere;* neither can it in legal contemplation be absent from the state of its creation." [Emphasis supplied.]

The Supreme Court of Florida has therefore flatly held that the mere fact that a corporation received its corporate charter from some other state fixes the exclusive residence of that corporation within the state which created it.[7] This

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[6]Petitioner submits that "for all practical purposes" on the record before this Court in this case, the residence of SCL is in Virginia, since the corporate headquarters and principal corporate officers reside in Virginia. Even more importantly, however, the *legal* residence of petitioner is in Virginia.

[7]Cf. *Adams v. Seaboard Coast Line Railroad Company*, supra, at p. 801 where the District Court said "it would appear to us that the mere fact that [SCL] received its corporate charter from some other state would not alter" the fact that for all practical purposes SCL is a Florida resident. That erroneous conclusion is based upon a factual finding (which in itself is incorrect) that SCL's principal place of business is in Florida. "Principal place of business" is the language used exclusively in establishing jurisdiction in the federal court, based upon diversity of citizenship, codified in 28 U.S.C. §1332(c), and has no relevance in any other context.

clearly shows that the residence of the Seaboard Coast Line Railroad Company is solely in the State of Virginia and that even under the unusual "nonresidence" requirement in Florida said company, the petitioner herein, is entitled to apply to the trial court to exercise its discretion in the application of the doctrine of forum non conveniens.

Why has the First District Court of Appeal of Florida said that the Seaboard Coast Line Railroad Company *is* for all practical purposes a resident of Florida, but yet the Third District Court of Appeal of Florida says that the Southern Railway Company, which also does business in Florida, has offices, employees and yards in Florida, and operates trains in Florida, *is not* a resident of Florida?

In taking that position the First District Court of Appeal of Florida has denied to SCL the equal protection of the laws, and it is for that reason the petitioner applies to this Court for relief. The situation created is flagrantly unfair. The Southern Railway Company is in active competition with SCL in Florida in the sale of its product, i.e., transportation services, with offices situated in Jacksonville, Orlando, Miami, Tampa and Palatka; it maintains competing train schedules in Florida and provides service at tariff rates equal to SCL's; it has a terminal operation and yard in Jacksonville, enabling it to provide that service; it connects at Jacksonville with the Florida East Coast Railway on a competitive basis with SCL;

and has roadway and track maintenance equipment and operates company vehicles in the State of Florida.

The principle appears to be well settled that all litigants "similarly situated" stand before the law on equal terms. This Court in the case of *Truax v. Corrigan*, 257 U.S. 312 (1921), stated that principle at pages 331 to 333 as follows:

> "This brings us to consider the effect in this case of that provision of the 14th Amendment which forbids any state to deny to any person the equal protection of the laws. . . . Our whole system of law is predicated on the general fundamental principle of equality of application of the law. 'All men are equal before the law;' 'This is a government of laws, and not of men;' 'No man is above the law,'--all are maxims showing the spirit in which legislatures, executives, and courts are expected to make, execute and apply laws. But the framers and adopters of this Amendment were not content to depend on a mere minimum secured . . . upon the spirit of equality which might not be insisted upon by local public opinion. They therefore embodied that spirit in a specific guaranty. . . .
>
> "Thus, the guaranty was intended to secure *equality of protection* not only *for all*, but against all *similarly situated*. Indeed, protection is not protection unless it does so." [Emphasis supplied.]

Likewise, in the case of *Southern R. Co. v. Greene*, 216 U.S. 400 (1910), the Court said at page 412 as follows:

> "The equal protection of the laws means subjection to equal laws, applying alike to all in the same situation. If the plaintiff is a person within the jurisdiction of the state of Alabama within the meaning of the 14th Amendment, it is entitled to stand before the law upon equal terms, to enjoy the same rights as belong to, and to bear the same burdens as are imposed upon, other persons in a like situation."

See also *Connolly v. Union Sewer Pipe Co.*, 184 U.S. 540 (1902); *Barbier v. Connolly*, 113 U.S. 27 (1885); *Hayes v. Missouri*, 120 U.S. 68 (1887); *Gulf, Colorado & Santa Fe Railway Co. v. Ellis*, 165 U.S. 150 (1897).

What does it mean to be "similarly situated"? One court has indicated that as between employees in an action under the Fair Labor Standards Act of 1938, 29 U.S.C.A. §201 et seq., the words "similarly situated" apply where there is *any* similarity. *Distelhorst v. Day & Zimmerman*, 58 F.Supp. 334 (S.D. Iowa, 1944). The rationale in the "equal protection" cases is based upon reasonable classification. In *Truax v. Raich*, 239 U.S. 33 (1915), this Court said at page 42:

> "Classification . . . must regard real resemblances and real differences between things and persons, and class them in accordance with their pertinence to the purpose in hand."

The only expressed difference between Southern Railway and SCL is found in the language of the cases at issue. In *Southern Railway Co. v. McCubbins*, supra, the Florida Third District Court of Appeal said about Southern Railway at page 515:

> "The defendant railway company is a Virginia corporation. *Its principal office is not in Florida.* It has an office and agent in Dade County, Florida, but it does not operate its trains south of Jacksonville." [Emphasis supplied.]

In *Adams v. Seaboard Coast Line Railroad Co.*, supra, the Florida First District Court of Appeal recognized that Seaboard Coast Line Railroad Company was a Virginia corporation, but stated as follows at page 801:

> "The evidence further reveals, however, that although the defendant received its corporate charter from the State of Virginia, it *nevertheless maintains its official headquarters and principal place of business in Duval County, Florida.*[8] The trial court was of the view that this factor was immaterial in determining whether the doctrine of forum non conveniens was available as a ground for dismissing the action. With this conclusion we are unable to agree."[9] [Emphasis supplied.]

We submit that it is obvious that SCL is "similarly situated" as to the Southern Railway in Florida, and that any attempted classification of the two because of a difference in the *degree* of business they do in Florida is patently unfair and is purely arbitrary, oppressive and capricious. See *Joseph S. Finch & Co. v. McKittrick*, 23 F. Supp. 244 (W.D. Mo., 1938), affirmed by this Court at 305 U.S. 395.

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[8]That conclusion, even though irrelevant, is not supported by the undisputed record in this case. SCL has its corporate headquarters and principal corporate offices in Richmond, Virginia. [Appendix C, page A-15.]

[9]Ironically enough, the trial judge referred to was a member of the same First District Court of Appeal in 1966 which applied the doctrine of forum non conveniens to the predecessor corporation to the petitioner in *Atlantic Coast Line Railroad Co. v. Cameron*, 190 So.2d 34 (Fla., 1st D.C.A., 1966), and was then reversed by his former brethren in *Adams*, supra.

Even if Florida were SCL's principal place of business, that factor, put in "residence" terms by the Florida First District Court of Appeal, is only one which should be considered by the trial judge in applying the convenience test. See *Gore v. United States Steel Corp.*, supra, and *Gonzales v. Atchison T. & S. F. R. Co.*, supra.

If Florida is going to say, as it has, that the doctrine of forum non conveniens is inapplicable in a case where one of the litigants is a *resident* of Florida, then it must apply the test of what constitutes a resident without discrimination. The Supreme Court of Florida has said that a foreign corporation is a resident of the state which created it. "It cannot reside . . . elsewhere." *Fowler v. Chillingworth*, supra. To say that SCL is "for all practical purposes" a resident invites abuse and discrimination, and in this case it in fact has been denied the equal protection of the laws.[10]

Since *Adams*, supra, FELA plaintiffs are bringing their foreign suits exclusively in the *State* court against the Seaboard Coast Line Railroad Company, since the United States District Court sitting in Florida would transfer such cases to another district on the basis of preventing inconvenience and promoting justice [28 U.S.C.A. §1404(a)]. A list of the plethora of cases brought in Jacksonville during the five-year period following the *Adams* decision, involving nonresident

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[10]It is noted emphatically that the only equal treatment being sought by SCL is that it be permitted to apply to the sound discretion of the trial court as to application of the doctrine of forum non conveniens. That is the basis of the doctrine. See American Law Institute, *Restatement of the Law*, 29, Conflict of Laws (1971) §84b. Almost unbelievably, however, where SCL *is* involved, the trial court is "interdicted" from applying *any* discretion. See Appendix C, page A22.

plaintiffs and causes of action which accrued outside the State of Florida, is set forth in Appendix I. It will be observed that there were sixty-six of those cases (and the list continues to grow), most of which have or will involve many days of jury trials and are often processed through the appellate courts of Florida.

Neither the Southern Railway Company[11] nor any other corporations "similarly situated" in Florida are subjected to that same onerous burden.

2. SCL as a Resident

Even if the Seaboard Coast Line Railroad Company is considered a resident of Florida, the distinction made between residents and nonresidents denies to SCL the equal protection of the laws under the Fourteenth Amendment to the United States Constitution. In Florida the application of the doctrine of forum non conveniens is restricted to the limited category of cases in which both parties to the transitory action are nonresidents. *Adams v. Seaboard Coast Line Railroad Co.*, supra, at page 800. Thus, in the case of *Southern Railway Co. v. McCubbins*, supra, a nonresident was allowed to apply to the trial court's discretion in the application of the doctrine; but, in the instant case, the Seaboard Coast Line Railroad Company, as a resident (as erroneously decreed by the court in *Adams*) is denied that same opportunity.

The author in 16 Am.Jur. 2d, *Constitutional Law*, §516, states at page 903 that "A statute which discriminates unjustly against residents in favor of nonresidents violates the equal protection clause," citing the case of *Little v. Smith*, 124 Kan. 237, 257 P. 959, 57 ALR 100 (1927). The Kansas

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[11]It is obvious that the Florida court was absolutely correct in the manner in which it treated Southern Railway. SCL in no way questions Southern's present right to contest any attempt by an out of state plaintiff to litigate in Florida. The error is not in the treatment of Southern, but in the mistreatment of SCL.

Supreme Court said in that case at 257 P. at page 961 as follows:

> "Most of the cases relating to discriminations have arisen where an added and unequal burden was placed upon the nonresident party, but no reason is seen why the resident discriminated against in favor of the nonresident is not entitled to complain and to have the same principle applied and should be awarded the same protection against inequality and injustice."

The doctrine of forum non conveniens is a matter "relating to venue." See *Southern Railway Co. v. Bowling*, 129 So.2d 433 (Fla., 3d D.C.A., 1961), and *Southern Railway Co. v. McCubbins*, supra. In a case dealing with venue, *Power Manufacturing Co. v. Saunders*, 274 U.S. 490 (1927), this Court found a state statute to be unconstitutional as depriving a foreign corporation of the equal protection of the laws where there was a distinction made between the resident and nonresident corporations as to venue in transitory actions. At page 494, the Court said in part as follows:

> "Here the separate classification of foreign corporations is in respect of the venue or place of bringing transitory actions. . . . So far as their situation has any pertinence to the venue of transitory actions it is not distinguishable from that of domestic corporations and individuals. Certainly there is no substantial difference. . . . Of course, the restricted venue as to domestic corporations and individuals is prompted by considerations of convenience and economy; but these considerations have equal application to foreign corporations. So far as the plaintiffs in such actions are affected, it is apparent that there is no more reason for a state-wide venue when the action is against a foreign corporation than when it is against a domestic

> corporation or a natural person. So we conclude that the special classification and discriminatory treatment of foreign corporations are without reasonable basis and essentially arbitrary."

We submit that a deprivation of a resident of the right to defend in the courts of Florida upon terms of equality with nonresidents in the state in respect of the doctrine of forum non conveniens is a denial of the equal protection of the laws. See 16 Am.Jur.2d *Constitutional Law*, §533, and 16A C.J.S. *Constitutional Law*, §561.

The Motion to Dismiss Would Probably Have Been Granted

The plaintiff is a nonresident of the State of Florida; the alleged accident which is the subject matter of the plaintiff's action occurred outside the State of Florida; the defendant is a Virginia corporation doing business in the State of Florida; and the witnesses involved in the case are nonresidents of the State of Florida. Furthermore, the potential third party defendant, who actually caused the alleged accident, if it was not caused by the plaintiff himself, lives outside the State of Florida, in the State of Georgia. It is the existence of the potential third party defendant beyond the subpoena power of the courts of the State of Florida, which has caused the Seaboard Coast Line to attempt to obtain some relief in this Court. That has been an important factor in many cases in considering transfer or dismissal of a case under similar circumstances, and we suggest that the trial court was strongly influenced by that factor, when it stated that "there are several sound reasons for application of the doctrine" in this case [See Appendix D].

The court in *Popkin v. Eastern Airlines, Inc.*, 253 F.Supp. 244 (E.D., Pa., 1966) in a case under 28 U.S.C.A. §1404(a), stated at page 248 as follows:

> "The ability to join third parties in a transferee forum, who may have caused the accident by their negligence is of course an important factor in movant's favor, when the same third parties cannot be joined in the transferor forum."

To like effect, the court in *Brown v. Blidberg Rothchild Co.*, 222 F.Supp. 18 (D. Del., 1963), stated at page 19:

> "The ability to join a third party defendant in the transferee district is a factor in favor of transfer. The transfer will eliminate a perfectly useless additional trial . . . "

In the case of *Thompson Products v. Pennsylvania Railroad Co.*, 127 F.Supp. 449 (S.D., N.Y., 1955), the court transferred an action in favor of having the issues tried in one action. See also *Banachowski v. Atlantic Refining Co.*, 84 F.Supp. 444 (S.D., N.Y., 1949), and *Nicol v. J. C. Penney Co.*, 97 F.Supp. 83 (E.D., Mich., 1951).

The SCL, under the lower court's ruling, will be required to defend the suit in Florida by its employee who contends that the railroad failed to furnish him a safe place to work. The railroad had a nondelegable duty to furnish respondent a safe place to work, even though the alleged unsafe condition was caused by a third party. In this case, the third party culprit is in Georgia. That is where the suit should be tried; otherwise there will be "a perfectly useless additional trial."

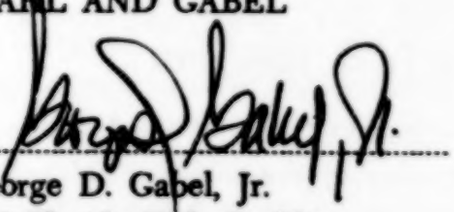
CONCLUSION

The action of the District Court of Appeal, First District in failing to allow the Seaboard Coast Line Railroad Company to apply to the discretion of the trial court for applica-

tion of the doctrine of forum non conveniens, when the Southern Railway Company had been allowed that same protection of the laws by the District Court of Appeal, Third District, both railroad corporations being "similarly situated" in the State of Florida, denies to the petitioner the equal protection of the laws under the Fourteenth Amendment to the United States Constitution and provides this Court with jurisdiction to review decisions below. For the reasons set forth above the petition for a writ of certiorari should be granted and the decision of the District Court of Appeal of Florida, First District, in this case should be reversed and the case remanded to the trial court with directions to exercise its discretion in the application of the doctrine of forum non conveniens.

Respectfully submitted,

WAHL AND GABEL



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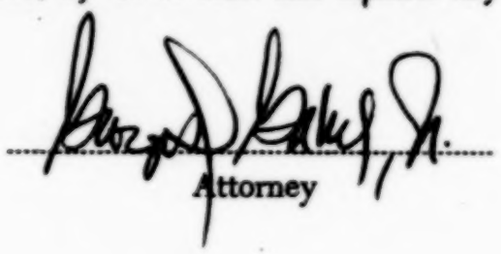
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Petition with separately bound Appendix was furnished to BECKHAM & McALILEY, 1010 Concord Building, 66 West Flagler Street, Miami, Florida 33130, by U. S. mail this 9th day of September, 1975.



Attorney